No. 3518.

In the United States Circuit Court of Appeals

For The Ninth Circuit

WEST SIDE IRRIGATING CO., *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. FRANK H. RUDKIN, *Presiding*.

PETITION FOR REHEARING AND SUPPORTING BRIEF

CARROLL B. GRAVES and
HARTMAN & HARTMAN,
Attorneys for Petitioner.

300-306 Burke Bldg., Seattle, Wash.

THE ARGUS PRESS, SEATTLE

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PETITION FOR REHEARING

Comes now the Appellant by its attorneys, Carroll B. Graves and Hartman & Hartman, and moves the Court herein for a rehearing and permission for reargument of this cause for the reasons and upon the grounds as follows:

I.

That the opinion rendered is not in conformity

with and based upon the admitted facts presented by the record and diverges therefrom.

II.

That the decision as rendered is not in conformity with the weight of authority in this, that it is contrary to the rules and principles of equity governing the issues as joined.

III.

That by the opinion, it seems that a digression has been had from the proceedings taken below in this, that the so-called motion of Appellee was, by the Lower Court, treated only as a demurrer to the bill on the general ground and all other parts thereof stricken and disregarded, while in the opinion it appears that the Court has given consideration to the allegations in the so-called motion, which allegations are, and as considered would be, in the nature of an answer joining an issue and calling for a trial upon the merits, by the *nise prius* court.

IV.

That the equities in the case have not received due consideration in that the Appellant has never acquiesced in the original judgment and that no prejudice has been shown to have been suffered by the Appellee because of delay or want of diligence in filing the bill herein and under the admitted case Appellee is not prejudiced or injured.

V.

That by the admitted allegations of the bill under the record the uncontradicted fact is presented

to this Court, that it must be assumed, in the absence of any allegations to the contrary, if the water in dispute was not used by the Appellant it runs into many ditches of private ownership with unadjudicated rights, over whom the Reclamation Service has no power or authority, nor the State, until all rights are adjudicated, and thereby, and because thereof, great injury would accrue to the Appellant and no damage to the Appellee.

VI.

That notwithstanding, the undisputed record shows that Appellant is entitled to cancellation of the so-called Limiting Agreement because of mistake—notice of same and repudiation both by actual notice and by Appellant's conduct fully understood, by Reclamation Service; and therefore the decision in this case will deprive the Appellant of the relief prayed for on the ground that the notice of revocation of the contract given to the Appellee was not technically definite or sufficient and Appellant should be granted such relief in this action.

VII.

That it is shown by the record that fraud has been practiced by which the Appellant was injured, if the judgment rendered shall be enforced, and no opportunity given for redress.

VIII.

That an error of law has been committed in holding that the mistake pointed out at time of agreement had to be mutual.

IX.

That there is no mutuality of remedy. In the resolution of the board of directors quoted in this decision it does not say "Provided the government should complete the irrigation project as stated by the court—but, provided the government completes the High Line Canal." This "High Line Canal" referred to was a contemplated or proposed canal in Kittitas County just above the canal of the West Side Irrigating Company's Canal and the wastage and seepage from such a project would have materially benefited the West Side Irrigation Canal by directly wasting into it. But no such canal is now even projected or contemplated by the Government and it is the general concensus of opinion that it never will be built by either the Government or private parties on the West Side of the Yakima River in Kittitas County. So that beside the question of mutuality of remedy, it is absurd to say that the Appellant could compel the Appellee to carry out this or any other proposed project. There is, therefore, apparent want of equity in going outside the record and not confining this decision to the record as presented to the Court.

X.

That if the decision shall stand, remain and be enforced, the Appellant will be deprived of its property without due process of law, the Constitution of the United States will be violated and be disre-

garded, and the Supreme law of the land held for naught.

Wherefore, the Petitioner prays that your Honors may take under consideration the grounds alleged above, order and direct a rehearing and reargument of this cause and set the time therefor, and in presenting this petition, as a part thereof, and to sustain the same, the Petitioner respectfully submits and calls the Court's attention to its brief thereon hereinafter following.

That an order may be made and entered directing and allowing the Appellant to serve copies of the petition and brief on Appellee, and that such other and further orders may be made as shall be just and right.

WEST SIDE IRRIGATING COMPANY.

By CARROLL B. GRAVES and
HARTMAN & HARTMAN,

Its Attorneys.

300-306 Burke Bldg., Seattle, Wash.

We, the undersigned, attorneys of record and counsel for West Side Irrigating Company, Petitioner aforesaid, do hereby certify and state that in our judgment and opinion the Petition for a rehearing is well founded in law and that it is not interposed, filed or urged for the purpose of delay or to hinder the orderly procedure of justice.

Dated at Seattle, Washington, this 26th day of January, 1921.

CARROLL B. GRAVES,
HARTMAN & HARTMAN,

No. 3518.

In the United States Circuit Court of Appeals

For The Ninth Circuit

WEST SIDE IRRIGATING COMPANY, *Appellant*, vs. UNITED STATES OF AMERICA, *Apellee*.	No. 3518 BRIEF UPON THE PETITION FOR REHEARING

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. FRANK H. RUDKIN, *Presiding*.

BRIEF UPON THE PETITION FOR REHEARING

The Petitioner, West Side Irrigating Company prays the indulgence of the Court in filing a supplemental brief in support of the Petition for Rehearing and respectfully urges the Court to consider the same in connection not only with the Petition but because of an issue of grounds set forth

in the brief. An eminent American statesman of our early period once said, "Nothing is ever settled until it is settled right." We firmly believe that if this cause finally rests upon the decision rendered on the 3rd of January last that it will not be settled in accordance with this axiom which has become a part of our supreme law as though within our sacred constitution.

ARGUMENT.

I.

1. It is with considerable trepidation that we approach the argument for a rehearing of this cause. When an action has been presented more than once to a Court, it becomes more or less irksome, particularly to the Court, to further consider any argument because most of us conclude that all the reasons ought to have been presented in the first instance.

However, we are conscious of the fact, after a more careful study of the whole situation, that we did not present all that should have been presented to the Court as reasons why the Appellant should have prevailed. For our admitted dereliction may we now, humbly confessing, make amends.

We believed that there was no contract at all and, therefore, upon the argument, presented the cause from that viewpoint. The Court, however, has arrived at a different conclusion. Without prejudice

to this position, we now readily see that we should have gone further and shown that even if there was a contract existing, nevertheless because of the strong allegations in the bill by the Appellee admitted, because of the general demurrer, for these reasons, if for no other, a reversal should be had in order that the facts may be presented and a trial had upon the facts and not allow the case to be concluded upon a theory contrary to and in violation of the rules of equity.

Naturally counsel for Appellee would be tempted to present extrinsic facts, because they were denied the right to present an issue upon the tendered motion which they made and did, both in the written and oral argument, go outside of the record and drag in outside and extrinsic matters, which would be pertinent at a trial on an issue of facts, *but not otherwise.* This having been done, counsel for Appellant to a certain extent did not meet it, nor do we now think we should have so done. All this gives a false coloring and must of necessity have had some effect upon the Court.

We emphasize this because it is apparent that even the Court itself, which it should charge to counsel, has gone outside of the admitted case presented and presumed a state of facts to exist which are admitted not to exist. For instance, it is alleged that Swigert was a witness. This is admitted by Appellee, yet the Court bases some of its reasons for reversal upon the conclusion that Swigert was

not a witness. By using the allegation in the rejected motion only, could this have been so determined as a fact. We use this as an illustration to show that counsel for Appellee, did not hew to the line as they should have done, and believe these are reasons that will strongly appeal to any one why, if not a different decision shall be reached, at least a rehearing shall be granted to give counsel the right to correct the wrong impression which may have been made.

2. Under well reasoned cases of the Supreme Court this whole proceeding is a case in equity purely and that must be kept in view at all times. It seems to us that the Court has overlooked this fact and has treated the action from the viewpoint of the code pleadings under technical law rules.

We are persuaded that there has been fatal error all through this proceeding, as well in the judgment of the District Court, as in the opinion of the Court of Appeals, in disposing of the fundamental ground of mistake as one determined by the judgment sought to be vacated. The opinion of the Court in that case has been cited several times as settling this issue, holding that there was no satisfactory evidence of a mistake in that case. But the mistake there considered was the belief of the West Side Irrigating Company that the contract was intended to limit the water diverted to 80 cubic feet at the distribution boxes, whereas it was held that the contract plainly meant at the point of intake.

That was the only question of mistake at issue in that case, which was wholly one turning on construction of the meaning of the contract. That can not be held a determination of whether or not the evidence now offered is sufficient, because we offer to prove that appellant repudiated the contract because it understood and was so advised by the agent of appellee that 80 cubic feet at the intake was equivalent to 4,000 miners inches at the distribution boxes. Certainly the sufficiency of that evidence has not been passed upon before. In fact the materiality and binding force of it if proved must be admitted.

The opinion takes the position that the question of mistake and fraud, so strongly relied on in this action, was decided in the former case, but it is certain that the point was never in issue in that case or at any time until the question was presented here. Both courts have heretofore intimated to the contrary but such *was not* pleaded in the answer.

Thus a new and distinct question is presented calling for equitable interpretation only, and to which law rules have no application. Such are too harsh in equity cases.

The opinion lays stress upon the fact that the moving party waited an undue time after discovering what Mr. Noble had testified to on or about the 18th day of June, 1918. Ample reason is pleaded, and under the pleadings admitted, why the delay occurred. Negotiations were pending be-

tween the parties by letters, conferences and otherwise (paragraph X of the Second Amended Bill, Record p. 24) and these negotiations were not completed when the action was commenced because the Irrigating Company did not dare wait longer. More, under the Washington Statute, which governs, if there is no Federal Rule, the Appellant has three years from June 18th, 1918, to bring its action (Remington's Code, Par. 159). This being an equitable proceeding, it is by the pleadings admitted, that the Appellant acted in the best of faith, therefore it should be rewarded rather than punished for this delay.

3. By inference, from the opinion rendered, we draw the conclusion that the Court may have the feeling that the Appellant is seeking to trifle with orderly Court procedure. Such is farthest from the minds of any of the parties. We beg to assure the Court that no such thought has ever entered the mind of either litigant or counsel. The Appellant and its shareholders are fighting desperately, as it is very apparent, to protect all they have and that which they have enjoyed so long. And why should they not so contend? Would they, under the circumstances, be true if they should do otherwise. Their homes and their firesides are at stake. They have been persistent and insistent we admit, but that is the spirit which should accentuate every good and high class citizen and red blooded American. If the water, which they have so long enjoyed and

owned, is without any consideration taken away from them and allowed to run waste and to other parties not parties to this suit, their rights are seriously imperiled, their property values threatened and at least greatly damaged if not ruined and their property taken without due process of law and in violation of the Federal Constitution. If this insistence and persistence damaged any one or any party whomsoever it might be different. But such course does not and cannot damage any one. Equity certainly, therefore, will come to the rescue.

True the Appellee, by answer, might plead facts, although not at any time having so intimated, that it would be damaged by the loss of this water. If so, that comes upon the trial of the issue. We can not so presume under the issue as now presented. And it is time enough to meet such an issue if and when it arises.

This cause was tried and determined upon a demurrer to the bill and thereby everything in the bill admitted to be true. This condition can not and must not be departed from without violating all rules of procedure. We note, however, that the Court refers to a statement, which is allowable only in an answer, in the so-called motion. Such statement was expressly eliminated by the order of the District Judge, and it must be kept in mind that Judge Rudkin specifically stated and ordered that he would hear and consider the pleading interposed as a general demurrer to the bill, and not

otherwise. To take any other view is unfair to the trial judge, to all the parties, to all well considered procedure, and to this Court itself. We know it was not the intention of the Court to overlook the fact that the bill is challenged by a demurrer and allow the allegations, in the so-called motion which would be denied on pleadings, to have any weight or to influence the Court, but this seems a fair deduction on reading the opinion. This it seems to us alone, even conceding there are no other grounds, demands a setting aside of the opinion and calling for a reargument. Of course this may have occurred possibly, because Appellant may not have made its cause clear, and further this Court may be impatient because of the persistencies as indicated. In any event a mistake has been made and now no one is concerned who made it, but all are concerned in helping to make the correction.

True, we do not insist that Mr. Swigert or anybody in charge of the Reclamation Service desired to purposely, intentionally, fraudulently and deliberately deceive the Appellant who is and long has been an owner, holder and user of the public waters by lawful appropriation, superior to any rights of the Appellee, whose rights were conferred by the State Legislature in 1905 (Session Laws 19, pp. 180-2). But everyone knows well that there is *actual fraud* and *constructive fraud.* No matter which kind is practiced the redress remedy is the same in each. We do insist and so plead, and it is

admitted by the Appellee that a *constructive fraud* was perpetrated upon the Appellant, and that is what we want to meet and have a chance to try the issue squarely and fairly in open Court, and upon the facts being presented if we are wrong, the costs will be paid and that is the end. Fraud is always fraud whether actual or constructive. The fraud charged can be met only by proof and it seems to us passing strange that the Reclamation Service is unwilling to come out in the open and face the charge in a Court trial upon an issue squarely drawn.

4. In considering the closing part of the opinion, we are convinced that the Court has not kept in mind the fact that the Appellee is not here in its sovereign capacity, but in a private business capacity on an exact parity and on the same standing, with the Appellant. This Appellee admits by its demurrer. The case of *U. S. vs. Strang* from the Supreme Court decided January 3rd, 1921, aids us in this position. We appreciate that we have so long regarded the United States as appearing in Court only in its sovereign capacity that we forget to assign it to its proper place when it does appear as a competitor with individuals, in a private capacity as a business concern, a position which it has assumed only in the last few years under the pressure of a strong desire for a parental form of government.

Under stress of circumstances, the Appellee in

its activities has more and more departed from its merely political or governmental functions and invaded many fields heretofore occupied wholely by personal enterprise, and when it does it must and shall abide by the rules imposed upon the citizen when carrying on similar enterprises.

It is only in these later days that the United States has gone into a general business outside of perfoming the parts required of the sovereign. We naturally should give an artificial advantage to the Appellee when acting in its sovereign capacity, but that disappears absolutely, and should and does disappear absolutely, when it goes into competition in ordinary business enterprises with private individual and corporate enterprises.

5. The review is denied because it is claimed there is want of diligence in discovering the evidence of carrying home the notice of protest to the Reclamation Service prior to the trial. This position is not tenable. It is inequitable and a violation of conscience, to deny Appellant relief on this ground. The Reclamation Service occupied a fiduciary relation as to the water users, and it was not merely a case of refraining from disclosing testimony, of facts material to the opposing party, but the Appellee made positive claim of want of notice of protest and strong argument in its brief, before both courts, on that point. The Appellee was an agent for other water users than Appellant's shareholders, having advanced money for

ditch and impounding construction and seeking to have its money returned later. In fact, it was and is a mortgagee operating for other water users than the Appellant until its money advanced is paid by the users, when all its direction ceases.

Moreover, there was and is no proof of any material injury or injustice to the Appellee by reason of the delay or want of discovery, while great damage and injustice is admitted to Appellant. Therefore, under all equity rules and under such admitted facts the right to remedy the wrong can not, must not, and shall not be denied. In equity the strict rules of law must always be subservient to justice and good conscience. We fear in this case this rule, unconsciously, has been disregarded and not applied.

5. It is held that the protest made, after the contract was deliberately ended, was not formal and/or definite. Such conclusion ignores the fact that Appellant has never complied or been required to comply with the judgment. It repudiated the so-called contract or limiting agreement the first time compliance was demanded and has never been molested in all the past thirty (30) years, in the full use and enjoyment of the water by it owned and appropriated. Repudiation may not have been pleaded in the former trial. However, that is entirely immaterial, but the *Appellee has never been at any time in doubt about the attitude of the Appellant.* This fact is plain, outstand-

ing, considered, admitted and fully understood at all times. To hold that the Appellant acquiesced, notwithstanding the newly discovered evidence, is highly artificial and technical, and not substantial justice or equity. It is allowing the rigor of the law to undo right. It visits a manifest injustice upon one without considering rights, *and* while invoking such a harsh rule no benefit accrues to the Appellee. Wrong, sometimes, may be suffered and by law enforced, if thereby another is greatly benefited. But that harsh rule cannot be even invoked here. All the admitted facts, measured by the rules, forbid.

7. We trust we will not be deemed objectionable if we say that the whole decision seems to rest on technicalities and not equity. We can quite understand why the Court may for the time being have reached such a conclusion and under the theory that there must be an end of proceedings. But in this case we insist that we have not trespassed upon patience, that we have not gone beyond our rights, that we are within all equity rules, and that conscience and the best good for all is on our side.

After all, the only questions, arising on the demurrer before the court, are whether or not the newly discovered evidence and issues presented are material, and if so, is Appellant estopped from applying for a bill of review on that ground?

That they are material must be admitted, when

it is remembered that the judgment sought to be vacated in its last analysis rested upon the rejection of the issues now raised, first, because not raised by the pleadings in that case, and second, because of acquiescence on the part of Appellant by failure to notify the United States of its repudiation of the contract, which deficiency in the evidence the newly discovered evidence supplies. It is true the court holds the notice was not formal, but this is a demurrer, and formal notice might and can be proved under the allegations of the bill.

Then is appellant estopped? With any convincing reason, it can not for a moment be argued that it has done anything to acquiesce in or comply with the decree, or in any way estopped itself from maintaining a position it has asserted at all times. But it is held that Appellant was not diligent in obtaining the newly discovered evidence from Mr. Noble by interrogating him on the witness stand, or before the trial, instead of immediately after he left the stand. It must be remembered that the question of repudiation was not in issue then, as Appellant was proceeding on the theory that the contract when properly construed expressed its understanding and agreement. In any event, Appellant is here denied relief, not for want of diligence, as we are constrained to view it, but for failure to do much more than was required under the circumstances; more than sanctioned proceedings in

and under any circumstances require or ever invoke.

II.

1. Admit for argument's sake that the contract was not repudiated and, therefore, is in existence subject to the right of cancellation for fraud in obtaining it.

Then, we insist that the demurrer must be overruled for three reasons.

1st. Because the allegations of the Second Amended Bill show that the notice given was sufficiently definite to constitute abrogation of contract as between the parties and, therefore, there was no contract in existence to be enforced by the judgment here sought to be vacated unless fraud shall be enthroned, and

2nd. Even if the Court should not hold that the contract was thus abrogated by act of the parties, the bill must be sustained in the form of an action for rescission of that contract, which relief was denied on the former trial because of failure to overcome the presumption of ratification and acquiescence, owing wholly to the want of evidence, then in possession of the Appellee, but not discovered nor could it be discovered by the Appellant until after the final judgment was rendered, and which the Court has already found in this proceeding is amply sufficient to justify review and rehearing of the whole case; and,

3rd. This whole question is one that can be

reached only by answer, and cannot be passed upon by way of demurrer directed against the bill.

In our brief we have cited many authorities. But the Court seems to place its conclusions on its own rules, reasoned out. Often this is best and so far we have followed this course. However, it will, we trust, aid the Court to quote new authorities, bearing upon the new points earnestly made. And we are most earnestly pleading here for the cause is desperate if Appellant loses. Its loss can not be recouped. The waters of the Yakima River are all appropriated and this Appellant has not the finances or credit to go into the high mountains and create impounding reservoirs.

On this second point suggested above the authorities hold that a plea of laches in discovering fraud is not a good defense and that no notice of disaffirmance is necessary further than the bringing of a suit for rescission upon the grounds of fraud.

Note the following:

> One induced by false representations to deal with another under circumstances permitting rescission of the contract for fraud does not, within the limitations of statute, lose any remedy to redress the wrong by mere delay to act prior to receiving knowledge of the facts or failure by reason of want of ordinary diligence to obtain such knowledge.

Hall vs. Bank of Baldwin, 127 N. W. 969, 143 Wis. 303.

Notice of disaffirmance is not required, when rescission is based and claimed on grounds of fraud.

Wolf vs. N. W. Nat'l. City Bank, 170 App. Div. 565, 156 N. Y. S. 575.

Where rescission is sought in equity, the rule of the best considered cases is that notice of disaffirmance by complainant is not a prerequisite to relief, but that the institution of the suit constitutes sufficient notice of complainant's election to rescind the contract, and no prior notice need be given.

9 C. J. 1207.

Bringing an action to rescind a contract for fraud is sufficient notice of election to rescind.

Lufkin vs. Cutting, 225 Mass. 599, 114 N. E. 822.

The necessity of giving notice upon the rescission of a contract exists only when the party rescinding has received some benefit or advantage from the contract, which he must surrender before he can claim to rescind.

Ripley vs. Hazelton, 3 Daly (N .Y. 329).

2. Further authorities may be cited, as bearing upon the charge of laches against the plaintiff, particularly in view of defendant's conduct in withholding the facts unknown to plaintiff, and even misleading the plaintiff at the time of the trial, as follows:

No duty to make inquiry arises, where de-

> fendant has so conducted himself to plaintiff's knowledge as to lull him into a sense of security and justify him in believing no mistake has been made.
>
> 25 Cyc. 1197.

This doctrine is most pertinent when applied to the admitted facts in this case. The conduct of Appellee at all times, in making investigations and otherwise was such that it did lull the Appellant and its shareholders into a sense of security, and it was justified in believing that it was entitled to and would not be molested, in holding all the water, rights and property, which it had so long enjoyed and owned.

Note further the rule:

> It has been said that the matter upon the discovery of which a bill of review is based, if previously known to the other party must be of such a nature that he was not in conscience obliged to have discovered it to the Court; and if it was known to him and such as in conscience he ought to have discovered, he obtained the decree by fraud, and it ought to be set aside by an original bill.
>
> Foster's Federal Practice, Vol. 2, p. 1408 (5th Ed.).
>
> No act of a party will amount to a confirmation of a fraudulent transaction, or acquiescence therein, unless done with full knowledge of the fraud.
>
> 6 Cyc. 305.

Inasmuch as plaintiff acted promptly, in renouncing under the contract, upon discovering the proof for the misrepresentation in calculating the flow of water, there can be no estoppel for anything done by Appellee prior thereto.

> Estoppel by improvements made with the acquiescence of the other, cannot arise against one ignorant of his rights at the time.
>
> 48 L. R. A. (N. S.) 772 (note 2).

We cite this authority in the event the Court may take judicial notice of Appellee's improvements but otherwise it is not in point.

> A party defrauded in a contract will not be debarred of his rights unless his delay to assert them amounts to a waiver, or he consciously does some act which will prevent the other party from being put in as good a position as he was before.
>
> *Martin vs. Ash.*, 20 Mich. 166.

The doctrine announced in the Martin case applies with special force here. The silence of Appellee and its cloaking the fact of knowledge of the protest, and, at least by outward show, pretending that it did not have the notice, prevented the Appellant from otherwise protecting itself. This alone is sufficient for rehearing and reversal.

> In a suit for formal rescission in equity, it is not a condition precedent to bringing the suit, that the defrauding party be placed in *statu quo.*

Page on Contracts, Vol. 1, p. 220.

Fraud is clearly, specifically and truly stated and, for the time being, by the demurrer admitted. The rule is, and we think nothing to the contrary, as follows:

> A judgment obtained by fraud will always be set aside when the Court's attention is called thereto.

Metcalf vs. Williams, 104 U. S. 93, 95, 26 L. Ed. 665-666.

National Surety Co. vs. State Bank of Humboldt, 120 Fed. 593.

Aldrich vs. Crump, 128 Fed. 984.

Sanford vs. White, 132 Fed. 531.

This is a strong doctrine but salutary. It is right and certainly has application at this time.

The 120 Fed. noted above, after citing with approval many decisions of the Supreme Court of the United States and other Courts, lays down the rule governing questions of this kind and naming the elements which must be complied with in order that relief shall be granted as follows:

> "The indispensable elements of such a cause of action are (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of

fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law."

National Surety Co. vs. State Bank, 120 Fed. 599.

Appellant's relief sought falls within all the rules laid down and for that reason a different conclusion should be reached. Even if the fraud charge is eliminated then under this case under the ground of accident and mistake the remedy will lie. The allegations of the bill are ample and sufficient therefor.

May we call the Court's attention specifically to the Metcalf case in the 104 U. S. above and quote therefrom the following (the italicized words being ours and not as in the opinion):

When a party has been deprived of his right by *fraud*, *accident*, or *mistake*, and has no remedy at law, a court of equity will grant relief. Perhaps in view of the equitable control over their own judgments which courts of law have assumed in modern times, the judgment might have been set aside, on motion, for the cause set forth in the bill; but if this were true, the remedy in equity would still be open; and the fact that the court declined to exercise the power upon motion, rendered the resort to a bill necessary and proper. Formerly bills in equity were constantly filed to obtain new

trials in actions at law, a practice which still obtains in Kentucky, and perhaps in some other jurisdictions; but the firmly settled practice by which courts of law entertain motions for new trial, and the dislike of one court unnecessarily to interfere with proceedings in another, has caused an almost total disuse of that jurisdiction. Courts of equity, however, still entertain bills to set aside judgments obtained by fraud, accident, or mistake.

Metcalf vs. Williams, 104 U. S. 95-96.

We quote this opinion for three reasons, as follows:

1st. Because Appellee in the Lower Court questioned the right to proceed as we did proceed, and

2nd. Because it clearly shows that the Appellant is within its rights.

3rd. Because to deny the right of trial as claimed by the Appellant and admitted by Appellee, would be taking property and property rights without due process of law and in violation of the Constitution of the United States.

III.

Bearing upon the question of fraud, mistake, misrepresentation, misunderstanding and similar points, all having a bearing upon this case, we desire to call the Court's attention to the following from Cyc.:

6 Vol. p. 286.

9 Vol. pp. 388 and 395.

16 Vol. pp. 84-5.

36 Vol. pp. 600 and 603.

In

16 Cyc. 68

with numerous authorities sustaining the text, we find that where relief is given because of mistake of one party alone, it is where it is induced by the conduct of one party, or where the other party seeks unconsciously to take advantage. This principle it would seem to us applies here.

There was a mutuality of mistake, for we want to put it no harsher than that, so far as Mr. Noble is concerned. He seemed to think, or at least said, that 80 second feet was the same as 4,000 miners inches, and induced the Appellant and its Trustees to so believe. Had they not so thought they never would have acted. This is a tryable issue as will appear by the following citations from Cyc. and the numerous authorities there quoted, to-wit:

16 Vol. p. 71.

36 Vol. pp. 604-5 and 608.

It would seem to appear from the opinion in this cause that the Court has treated the controversy as one in law and not equity. We think there is no question under the Supreme Court decision cited, but what this is an action in equity purely fusing if not contrary to the principles involved; and that being admitted the opinion at least is conthis affording a strong reason why the rehearing must be had.

We submit this whole cause with confidence in our position and firm in the belief that the rehearing will be granted, and upon a rehearing more time allowed than is usually given under the rules in which to present this most important question. Not only are Appellant's stockholders involved, but many other of the small ditch owners and users through the State of Washington and other states, where the Reclamation Service is engaged in irrigation, are likewise involved. Then further it involves the sacred right of taking property without compensation and due process of law.

Respectfully submitted,

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HARTMAN & HARTMAN,
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